IN THE SUPREME COURT OF THE STATE OF DELAWARE

LETONI WILSON, Mother and Next Friend of TIRESE JOHNSON, a minor child	§	No. 770, 2010
Plaintiff Below-Appellant,	§	Court Below: Superior Court of the State of Delaware in and for New Castle County
v.	§	
MICHELE MONTAGUE,	§	C.A. No. 07C–04–025
Defendant Below-Appellee.	§	

Submitted: February 16, 2011
Decided: May 3, 2011

Before **BERGER**, **JACOBS**, and **RIDGELY**, Justices.

O R D E R

This 3rd day of May 2011, it appears to the Court that:

(1) Plaintiff-Below/Appellant, Letoni Wilson, appeals from a Superior Court order, which denied her motion to vacate an order of dismissal. Wilson raises three arguments on appeal. First, Wilson contends that the Superior Court abused its discretion in failing to make a specific finding that Defendant-Below/Appellee, Michele Montague, and her attorney engaged in criminal and ethical misconduct under Superior Court Civil Rule 60(b)(3). Second, Wilson contends that the Superior Court erred in interpreting Rule 60(b)(3) to require Wilson to show that she was prejudiced by the alleged misconduct of Montague

and her attorney. Third, Wilson contends that the Superior Court erred in interpreting Rule 60(b)(3) to require Wilson to show that the concealed evidence would have changed the outcome of the litigation. We find no merit to Wilson's appeal and affirm.

(2) Wilson alleged that her son, Tirese Johnson, developed brain damage as a result of delays in diagnosing and treating him for jaundice.[1] Wilson named Dr. Phyllis James, New Castle Family Care, and Michele Montague as defendants. The Superior Court dismissed Montague, a licensed physician's assistant who examined Tirese during an office appointment, because Wilson's sole standard-of-care expert, Howard Bauchner, M.D., lacked knowledge of the standard of care applicable to Delaware physicians' assistants.[2] Wilson moved for reargument, but the Superior Court denied that motion.[3] Following Montague's dismissal from the case, the matter proceeded to trial against James and New Castle Family Care. Wilson obtained a $6.25 million verdict. We affirmed that judgment.[4]

(3) After the trial, Wilson's counsel began to represent James in a separate suit against her insurer and her counsel in this case, alleging breaches of contract and fiduciary duties in their handling of her defense. During discovery in

[1] The undisputed material facts in paragraphs 2, 3, and 4 of this Order are taken from the Superior Court's order, which denied Wilson's motion for relief from judgment. *See Wilson v. James*, 2010 WL 4514349, at *1 (Del. Super. Oct. 22, 2010).
[2] *See Wilson v. James*, 2010 WL 1107787 (Del. Super. Feb. 19, 2010).
[3] *Wilson v. James*, 2010 WL 1107301 (Del. Super. Feb. 25, 2010).
[4] *Wilson v. James*, 2 A.3d 75, 2010 WL 2868186 (Del. 2010) (TABLE).

that action, the defendants disclosed a letter written by James's attorney in this action, which referenced alleged alterations Montague made to Tirese Johnson's medical records. Apparently, Montague initially noted that Tirese had yellowed skin extending to his abdomen, but revised Tirese's chart to indicate that the yellowing extended to his sternum. According to Wilson, only the revised note was provided during discovery in this case. When questioned about the revised note during her deposition, Montague stated that she took no additional notes about her physical examination and never mentioned the existence of the original note that described the yellowing as extending to Tirese's abdomen.

(4) Wilson moved to vacate the Superior Court's order, which dismissed Montague, on the basis of newly-discovered evidence or fraud, misrepresentation, or misconduct under Rules 60(b)(2) and (3). The Superior Court denied that motion and explained:

> If [Wilson] had possessed the original examination note during discovery and been able to provide it to Dr. Bauchner, it would not have altered his lack of qualification to opine as to the standard of care applicable to a physician's assistant – at most, it might have made his opinion against Montague more emphatic, but that opinion would have remained inadmissible.
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> In seeking relief under Rule 60(b)(2) and (3), Plaintiff bears the burden of showing that a different outcome was probable; on the basis of her submission, the Court lacks a basis to understand how the new evidence presented would even have

> made a different result possible. Accordingly, Plaintiff's Motion to Vacate the Judgment is hereby DENIED.[5]

Thereafter, Wilson moved for reargument, but the Superior Court denied that motion. This appeal followed.

(5) Each of Wilson's three claims of error relate to the application of Superior Court Civil Rule 60(b)(3), which relevantly provides:

> (b) . . . On motion and upon such terms as are just, the Court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; . . . .

We review a Superior Court order denying a motion to vacate a judgment under that rule for abuse of discretion.[6] "An abuse of discretion occurs when a court has . . . exceeded the bounds of reason in view of the circumstances, or . . . so ignored recognized rules of law or practice so as to produce injustice."[7]

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[5] *Wilson v. James*, 2010 WL 4514349, at *2, 3 (Del. Super. Oct. 22, 2010). Although the Superior Court did not rely on it, Montague made the following sworn statement three days before the Superior Court denied Wilson's motion to vacate:

> [] It was not uncommon for Dr. James to review my clinical notes for accuracy. In connection with the [] note concerning my examination of Tirese Johnson, Dr. James discussed with me my notation of "positive yellow tint face/abdomen." She pointed out that such a note suggested that the belly area was discolored, which was not what I had observed. What I had observed was what I described in this litigation where I described finding yellowing "where the sternum ends the diaphragm begins."
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> [] Based on that description, Dr. James suggested that the more accurate terminology for the location of the discoloration would be "sternum" rather than abdomen. I, therefore, re-wrote the note to so indicate and considered that to be the record of my examination.

[6] *Stevenson v. Swiggett*, 8 A.3d 1200, 1204 (Del. 2010) (citing *Apartment Cmtys. Corp. v. Martinelli*, 859 A.2d 67, 70 (Del. 2004)).

[7] *MCA, Inc. v. Matsushita Elec. Indus. Co., Ltd.*, 785 A.2d 625, 633–34 (Del. 2001) (quoting *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994)).

(6) "On appeal from the grant or denial of a motion for relief under Rule 60(b) a party may attack only the propriety of the order; Rule 60(b) 'does not permit the appellant to attack the underlying judgment for an error which he could have complained of on appeal from it.'"[8] We have explained that "[t]here are two significant values implicated by Rule 60(b)."[9] "The first is ensuring the integrity of the judicial process and the second, countervailing, consideration is the finality of judgments."[10] "Because of the significant interest in preserving the finality of judgments, Rule 60(b) motions are not to be taken lightly or easily granted."[11] "A proper standard must strike a balance between the interest in bringing litigation to an end and the countervailing concern that justice is carried out."[12]

(7) Wilson argues that the Superior Court abused its discretion in failing to make a specific finding that Montague and her attorney engaged in criminal and ethical misconduct under Superior Court Civil Rule 60(b)(3). But, Wilson cites no authority that requires the Superior Court to make such a finding. Although an explicit finding of misconduct may have made our review of this issue more straightforward, Wilson has not shown that the Superior Court abused its discretion in that respect.

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[8] *Id.* at 634 (quoting *Swann v. Carey*, 272 A.2d 711, 712 (Del. 1970)).
[9] *Id.* at 634.
[10] *Id.* (citing *Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns. Corp.*, 1996 WL 757274, at *1 (Del. Ch. Dec. 20, 1996)).
[11] *Id.* at 635 (citing *Metlyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826, 830 (7th Cir. 1985)).
[12] *Id.*

(8) Wilson also argues that the Superior Court erred in interpreting Rule 60(b)(3) to require Wilson to show that she was prejudiced by the alleged misconduct of Montague and her attorney. Specifically, Wilson argues that "this Court should find that under the unique circumstances presented in this case, the instant plaintiff was not required to show that she suffered prejudice as a condition to relief." For that proposition, Wilson relies on our decision in *Holt v. Holt*.[13] But, in that case, we explained that "[t]rial courts should be diligent in the imposition of sanctions upon a party who refuses to comply with discovery orders . . . ."[14] Consequently, the *Holt* court's analysis under Superior Court Civil Rule 37 is not directly applicable to our analysis here under Rule 60(b)(3).

(9) Wilson also quotes from two United States Court of Appeals cases: *Metlyn Realty Corp. v. Esmark, Inc.*[15] and *Seaboldt v. Pennsylvania R. Co.*[16] But, in *Esmark*, the Seventh Circuit affirmed the denial of a motion to reopen judgment and explained: "[A] highly deferential standard of review applies to a court's refusal to reopen even if it could be shown that a *party* had committed perjury."[17] And, in *Seaboldt*, although the Third Circuit remanded the case for a new trial, the *Seaboldt* court analyzed a violation of a discovery order, not an instance of

[13] 472 A.2d 820 (Del. 1984).
[14] *Id.* at 824.
[15] 763 F.2d 826 (7th Cir. 1985).
[16] 290 F.2d 296 (3d Cir. 1961).
[17] *Esmark*, 763 F.2d at 832 n.3 (citing *Int'l Nikoh Corp. v. H.K. Porter Corp.*, 374 F.2d 82 (7th Cir. 1967)).

perjury.[18] Consequently, the *Seaboldt* court's analysis is not directly applicable to our analysis here under Rule 60(b)(3). The *Esmark* and *Seaboldt* courts did not, as Wilson implies, focus solely on the nature or degree of misconduct. Even if they did, the facts of this case are not as "egregious" as Wilson suggests. Accordingly, Wilson has not shown that the Superior Court abused its discretion in failing to, as Wilson urges, "fashion[] a remedy to punish" Montague and her attorney.

(10) Wilson's third argument is similar: the Superior Court erred in interpreting Rule 60(b)(3) to require Wilson to show that the concealed evidence would have changed the outcome of the litigation. In their influential treatise, Charles Alan Wright and Arthur R. Miller explain that a prejudice analysis is appropriate under a Rule 60(b)(2) newly discovered evidence inquiry.[19] But, in the context of a Rule 60(b)(3) misconduct inquiry, Wright and Miller do not state that a determination of prejudice is required. Instead, Wright and Miller explain:

> [T]he burden of proof of fraud is on the moving party and that fraud must be established by clear and convincing evidence. Further, *the fraud must have prevented the moving party from fully and fairly presenting his case*. . . . The motion is addressed to the sound discretion of the court. The motion will be denied if it is merely an attempt to relitigate the case or if the court otherwise concludes that fraud or misrepresentation has

[18] *Seaboldt*, 290 F.2d at 298–300.

[19] 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2859 (2d ed.) ("A judgment also will not be reopened if the evidence is merely cumulative and would not have changed the result.").

> not been established. If the moving party satisfies the applicable tests, relief will be granted.[20]

At least one other court has purported to take that approach. In *Rozier v. Ford Motor Co.*,[21] the Fifth Circuit explained that "Rule 60(b)(3) . . . does not require that the information withheld be of such nature as to alter the result in the case."[22] But, in reversing a district court's denial of a motion for relief from judgment, the *Rozier* court concluded that the "misconduct *prejudiced* the plaintiff by denying her information which might well have reshaped the case she ultimately presented to the jury."[23] Accordingly, the distinction between the "full and fair presentation" test and the "prejudice" test is subtle, if a distinction at all.

(11) Other courts explicitly have required a determination of prejudice. In *Anderson v. Cryovac, Inc.*,[24] the First Circuit conducted an exhaustive analysis of Rule 60(b)(3) and concluded that a determination of prejudice is required. But, the *Anderson* court shifted that burden to the nonmoving party. The *Anderson* court summarized as follows:

> [I]n motions for a new trial under the misconduct prong of Rule 60(b)(3), the movant must show the opponent's misconduct by clear and convincing evidence. Next, the moving party must show that the misconduct substantially interfered with its ability

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[20] 11 *id.* § 2860 (emphasis added) (citations omitted).
[21] *See Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978) ("Rule 60(b)(3) . . . does not require that the information withheld be of such nature as to alter the result in the case.") (citation omitted).
[22] *Id.* at 1339 (citation omitted).
[23] *Id.* at 1349 (emphasis added).
[24] 862 F.2d 910 (1st Cir. 1988).

> fully and fairly to prepare for, and proceed at, trial. This burden may be shouldered either by establishing the material's likely worth as trial evidence or by elucidating its value as a tool for obtaining meaningful discovery. The burden can also be met by presumption or inference, if the movant can successfully demonstrate that the misconduct was knowing or deliberate. Once a presumption of substantial interference arises, it can alone carry the day, *unless defeated by a clear and convincing demonstration that the consequences of the misconduct were nugacious*. Alternatively, if unaided by a presumption – that is, if the movant is unable to prove that the misconduct was knowing or deliberate – it may still prevail as long as it proves by a preponderance of the evidence that the nondisclosure worked some substantial interference with the full and fair preparation or presentation of the case.[25]

(12) Our precedents have not articulated a precise burden-shifting test under Rule 60(b)(3), but in *Matter of $2,053.00 in U.S. Currency*,[26] we explained that "a petition under Rule 60(b)(3) must demonstrate a fair likelihood of success on the merits if the judgment were to be reopened to assert a claim or defense."[27] For that proposition, we cited to *Battaglia v. Wilmington Sav. Fund Society*,[28] which analyzed the circumstances in which a court might grant a motion under Rule 55(c) -- the rule under which a party may move to set aside a default

[25] *Id.* at 926 (emphasis added). *See also Venture Indus. Corp. v. Autoliv ASP, Inc.*, 457 F.3d 1322, 1334 (Fed. Cir. 2006) ("If [the moving party] makes [] a showing [of fraud], the district court must consider whether [the nonmoving party] established, by clear and convincing evidence, that the misbehavior had no prejudicial effect on the outcome of the litigation.").
[26] 676 A.2d 908, 1996 WL 209896 (Del. 1996) (TABLE).
[27] *Id.* at *1 (Del. 1996) (TABLE) (citing *Battaglia v. Wilmington Sav. Fund Soc'y*, 379 A.2d 1132, 1135 (Del. 1977)).
[28] 379 A.2d 1132 (Del. 1977).

judgment.[29] The *Battaglia* court evaluated that Rule 55(c) motion under Rule 60(b)(1) and (6), not Rule 60(b)(3).[30]

(13) The standard under Rule 60(b)(3) appears to be stricter than the standards under other subsections of Rule 60. The policy underlying Rule 60(b)(3)'s stricter standard likely is that courts do not want to condone misconduct, such as perjury. But, even under Rule 60(b)(3), we must "strike a balance between the interest in bringing litigation to an end and the countervailing concern that justice is carried out."[31] Here, the Superior Court struck that balance in applying the test articulated in *Matter of $2,053.00 in U.S. Currency*. In denying Wilson's motion for reargument, the Superior Court explained:

> [E]ven if the Court applied the burden shifting framework . . . and assumed that Montague's deposition responses constituted misconduct under Rule 60(b)(3), Montague's response and the underlying facts that led to the exclusion of Dr. Bauchner's testimony would carry her burden of establishing that the misconduct caused no prejudice to Plaintiff in the outcome of the motion *in limine*. Moreover, the record does not suggest that Plaintiff's counsel's "approach" was materially affected by Montague's misleading deposition testimony that no other notes from her physical exam of Tirese existed, particularly where Plaintiff's counsel never propounded document requests upon Montague and she was deposed in detail regarding where on Tirese's body she tested for yellowing of the skin.

[29] Super. Ct. Civ. R. 55(c) ("Setting aside default judgment. -- The Court may set aside a judgment by default in accordance with Rule 60(b).").
[30] *Battaglia*, 379 A.2d at 1135–36.
[31] *See Matsushita*, 785 A.2d at 635.

(14) Whether the circumstances of this case are considered under *Matter of $2,053.00 in U.S. Currency*'s outcome-determinative "prejudice" test or a "full and fair presentation" test, the Superior Court's analysis is persuasive. Accordingly, we find no merit to Wilson's third argument.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice